No. 81 5118

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

BENNY DIXON,

PETITIONER,

-vs-

ROBERT R. RAINES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENNY DIXON
P.O. Box B-27498
Florence, Arizona 85232
Petitioner - Propria Personam

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STATUTES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

BENNY DIXON,

PETITIONER,

- vs -

ROBERT R. RAINES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Benny Dixon, respectfully prays that a a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 19 May 1981.

OPINION BELOW

The Court of Appeals entered the Order denying Appellant's notice of appeal as untimely, Federal Rules of Appellate Procedure, Rule 4(A), on April 14, 1981, appendix "A" incorporated herein by reference thereto. Appellant filed motion for reconsideration April 27, 1981, said motion for reconsideration denied May 19, 1981, appendix "B" incorporated herein by reference thereto.

JURISDICTION

The jurisdiction of this Court in invoked under Title 28, U.S.C. Sections 1254, 1257 and 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall...be deprived of life, liberty or property, without due process of law."

"Under the Fifth Amendment any material change invalidates an indictment and deprives the court of the power to try the accused unpon it."

United States Constitution, Amendment VIV:

"Each person shall receive equal protection of the law."

QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied due process of law by the Arizona Supreme Court when his Pro Per Petition for Writ of Habeas Corpus, stating a claim that he was incarcerated as the result of an illegal grand jury proceeding, and that the indictment had been impermissably altered, all in violation of the 5th, 6th and 14th Amendents of the United States Constitution?

2. Did the trial court's denial of the defendant's request for a continuance based upon a stated need to acquire a transcript of state witnesses prior sworn testimony constitute error and an abuse of discretion?

3. Did the trial court commit abuse of discretion by allowing evidence of the defendant's prior convictions to be used for impeachment purposes?

4. Did the trial court commit reversable error by denying defendant's request for a mistrial based upon statements made to the jurors by prosecutor?

5. Was the United States Court of Appeals for the Ninth Circuit's determination and order denying Petitioner's application for Certificate of Probable Cause based upon error in the district court filing records?

STATEMENT OF THE CASE

In November, 1979 the Petitioner was convicted of four counts of sales of narcotic, Ariz. Rev. Stat. Sections 36-1002.02. Petitioner was sentenced to concurrent terms of 15.75 years on all counts, the sentence to run consecutive to a previously imposed setence term of 10.5 years. The Arizona Court of Appeals, Division II, affirmed. State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (Ct. App. 1980). The Arizona Supreme Court denied review September 30, 1980. Application for a state Writ of Habeas Corpus was denied November 4, 1980, appendix "C", incorporated herein by reference thereto. Thereafter, state remedies exhausted, Petitioner filed under Title 28, U.S.C.A., Section 2254, a Habeas complaint in the United States District Court in Phoenix, raising five gounds for relief, the contentions raised constituting violations of constitutional dimensions, appendix "D", incorporated herein by reference thereto. Based upon magistrate review and recommendation, the United States District Court denied relief by order and judgement filed January 27, 1981, appendix "E", incorporated herein by reference thereto. Petitioner's motion to rehear, filed February 10, 1981, appendix "F", incorporated herein by reference thereto, was denied by the United States District Court order filed February 11, 1981. Thereafter, Petitioner's notice of appeal to the United States District Court, appealing from the District Court ordering denying motion to rehear, was filed March 19, 1981, said notice of appeal dated February 11, 1981, appendix "G", incorporated herein by reference thereto. Thereafter, Petitioner received United States District Court's order denying Certificate of Probable Cause to Appeal, filed March 27, 1981, appendix "H", incorporated herein by reference thereto. Petitioner thereafter received copy of United States District Office of the letter dated March 27, 1981, appendix "I", incorporated herein by reference thereto. Petitioner mailed to the United States District Court an application for Certificate of Probable Cause and affidavit in support of motion to procedd on appeal in forma pauperis, appendix "J", incorporated herein by reference thereto, said articles not listed in the Document Index for the United States Court of Appeals, appendix "K", incorporated herein by reference thereto. Thereafter, Petitioner received Circuit Court order, appendix "A", dismissing Petitioner's appeal based upon the appellant's notice of appeal being untimely. Petitioner filed motion for reconsideration, said motion dated April 22, 1981, appendix "L",

incorporated herein by reference thereto. The United States Court of Appeals denied said motion for reconsideration, in order dated May 19, 1981, appendix "B".

REASON FOR GRANTING THE WRIT

(1) The Petitioner's conviction and sentence was obtained in violation of substantive due process of law, violative of the due process and equal protection clauses of the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment of the United States Constitution. For the reason that the record supports Petitioner's contention that an unauthorized witness appeared before the grand jurors in proceedings held September 5, 1979 and gave sworn testimony to facts that he had no personal knowledge of; the grand jurors were not appraised of the hearsay nature of said testimony, appendix "M", incorporated herein by reference thereto. The indictment itself was impermissably altered after the grand jury had found the true bill. The grand jurors specifically heard sworn testimony that a sales occurred on June 25, 1979. The indictment upon which Petitioner was tried and convicted alledges no such date and sales transaction, appendix "N", incoprorated herein by reference thereto. Supporting authorities: U.S. v. Prejean, C.A. Tex. (1974) 494 F.2d 495 and U.S. v. Estepa, (1972) 471 F.2d 1132.

(2) The trial court's interpretation of Arizona Rules of Criminal Procedure, Rule 6.1(e) was misinterpreted and the denial of the defendants pro se request for a continuence, based upon his stated need to obtain a transcript of a bond reconsideration hearing whereby the state's witness had appeared and given sworn testimony. It was the defendant's first request for a continuence--the trial court nad no previous knowledge of the case--and it was the defendant's first appearance before the trial judge who had been assigned to the case the previous day. Under Arizona law the charges were punishable by imprisonment of over one hundred years. The trial court's denial of the requested continuance based upon the foregoing constitutes abuse of discretion and denied the defendant substantial due process of law, due process and equal protection of the law, all guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. The defendant pro per, expressly stated to the trial court (R.T. Nov. 7, 1980, Id. at page 8, lines 18 through 25):

Defendant

"Your Honor, I would like to present to the court a continuance until I can receive the information on the reconsideration motion that was presented by the County Attorney's Office. I am in the process of trying to get a transcript of that hearing, and it is pertinent to my case...."

Authorities in support: N.Y. People v. Harper, 124 N.Y.S. 12, 139 App. Div. 344; N.D. State v. Chase, 117 N.W. 537, 17 N.D. 429, 17 Ann. Cas. N.D.; and State v. Adair (1970) 106 Ariz. 58, 470 P.2d 671.

(3) Admission of evidence of the defendant's prior convictions denied the defendant a fair trial, and in combination with the trial court's failure to give the defendant's requested Jury Instruction No. 3 regarding the limited use to be made of the prior convictions, constitutes a violation of due process, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Authorities in support: State v. Canedo, 608 P.2d 774; State v. Finley, 85 Ariz. 327, 335, 338 P.2d 790. Also, a purusal of State v. McClellan, (1980) 611 P.2d 948 in comparison with State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (Ct. App. 1980) shows a distinct denial of equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution. Culp v. Maughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed. 2d 368 (1973).

(4) The trial court erred in denying defendant's request for a mistrial based upon remarks by the prosecutor constituting prejudicial prosecutorial misconduct. Id. R.T. Nov. 8, 1979 at P. 47, lines 1 through 3:

"Head-on colliding with the truth told you by the officers is the testimony of Benny Dixon, a convicted felon."

The statement would not have appropriate had the defendant's trial been held in a bar room...respectfully. Based upon same, and denial of argument for mistrial, the defendant was denied a fair trial as guaranteed by the Constitution of the United States.

(5) The District Court's failure to rule upon the stated claim of an illegal grand jury indictment and proceeding held is error and a denial of due process; state remedies were exhausted upon the issue, appendix "O", incorporated herein by reference thereto. The district court clerk's filing of Petitioner's pleadings and submissions are misleading. Petitioner's Notice of Appeal was timely filed, appendix "K", incorporated herein by reference thereto. Petitioner's Notice of Appeal, appendix "G".

incorporated herein by reference thereto, was mailed to the United States District Court on the 11th day of March, 1981 and specifically appeals from District Court order dated February 11, 1981. The Circuit Court Index Document No. 12 lists a filing date of March 19, which constitutes a filing delay of eight days. Arizona State Prison is approximately sixty miles from the United States District Court in Phoenix. See appendix "K". The United States Court of Appeal for the Ninth Circuit made its determination denying Petitioner's motion for reconsideration, appendix L, incorporated herein by reference thereto, upon document filing dates not in accord with, and far in excess of, the mailing dates displayed on the U.S. District Court submissions mailed by the Petitioner from Arizona State Prison.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgement of the United States Court of Appeals.

Respectfully submitted,

Benny Dixon

BENNY DIXON
P.O. Box B-27498
Florence, Arizona 85232

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20TH DAY OF JULY, 1981.

Michael A. Shermetaro

NOTARY PUBLIC

My Commission Expires Jan. 27, 1985

My Commission Expires

One copy each mailed to:

Office of the Clerk
U.S. Supreme Court

and

Robert K. Corbin, Atty. Gen.
Jack Roberts, Asst. Atty. Gen.
State Capital Building, Westwing 2nd Flr.
Phoenix, Arizona 85007

81 5118

FILED

APR 14 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENNY DIXON, Plaintiff-Appellant, vs. ROBERT RAINES, Defendant-Appellee.	No. 81-8042 DC# CV 80-968-PHX-WEC Arizona (Phoenix) ORDER

Before: PREGERSON and BOOCHEVER, Circuit Judges

Appellant's notice of appeal is untimely. Fed. R. App. P. 4(a). This appeal is therefore dismissed for lack of jurisdiction.

CR CAL 4/6/81

Appendix - A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 19 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

BENNY DIXON, Plaintiff-Appellant, vs. ROBERT RAINES, Defendant-Appellee.	No. 81-8042 DC# CV 80-968-PHX-WEC Arizona (Phoenix) ORDER

Before: PREGERSON and BOOCHEVER, Circuit Judges

Appellant's motion of April 27, 1981 for reconsideration of this court's order dismissing this appeal is denied.

4/30/81

(CR CAL 4/6/81)

Appendix - B

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

November 5, 1980

BENNY DIXON,

Petitioner,

vs.

ROBERT R. RAINES,

Respondent.

Supreme Court
No. H-595-2

Pima County
No. CR-01750

The following action was taken by the Supreme Court of the State of Arizona on November 4, 1980 in regard to the above-entitled cause:

"ORDERED: Petition for Writ of Habeas Corpus - DENIED."

MARYANN HOPKINS-YOUNG, Clerk

By Linda Smith
Deputy Clerk

TO:

Benny Dixon, P. O. Box B-27498, Arizona State Prison, Florence, Arizona 85232
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 Attn: Jack Roberts
Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701

Appendix - C

IN THE SUPREME COURT OF THE UNITED STATES

JUL 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BENNY DIXON, Petitioner

v.

81 5118

ROBERT R. RAINES

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Benny Dixon, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

Benny Dixon
BENNY DIXON

AFFIDAVIT

I, Benny Dixon, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that, in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

A. YES. I am an inmate of the Arizona State Prison and am employed in that facility as a kitchen porter. I receive wages in the sum of thirty dollars ($30.00) per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

A. NO.

3. Do you own any cash or checking or savings account?

A. NO.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)?

A. NO.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. NONE.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Benny Dixon
BENNY DIXON
P.O. Box B-27498
Florence, Arizona
85232

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20th DAY OF July, 1981.

Michael A. Chernetsky
My Commission Expires Jan. 27, 1985